No. 9561

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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First Presbyterian Church of Santa Barbara, California, a religious corporation,

Appellant,

vs.

M. L. Rabbitt, as Trustee in Bankruptcy of the Bankrupt Estate of James Marwick, and James Marwick,

Appellees.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

This petition for rehearing is directed to that portion of the opinion of this Court which modifies the judgment of the lower court and which commences with the following words: "The judgment avoided not only the deed, but also the declaration of trust."

Counsel for appellee believe this petition for rehearing is entitled to unusual consideration because the opinion of the Court herein complained of raises a point which is entirely new to these proceedings.

I.

The Point in Question Was Not Raised by Appellant.

We urge the Court to carefully consider that the argument contained in that portion of the opinion with which we disagree was not raised by the appellant and that this is of utmost importance for the reason that had this point been raised, we would have caused matter to be put in the record which we did not deem necessary. To be more explicit, page 39 of the clerk's transcript contains the points relied upon in the appeal by appellant, to-wit, (1) there was consideration for the transfer; (2) the transfer was made prior to the incurrence of obligations of creditors; (3) the action was barred by the statute of limitations. These three points are reaffirmed by the document filed by appellant appearing on page 94 of the clerk's transcript. After the statement of points was filed it became necessary to prepare the record and both sides had an opportunity to cause such matter to be inserted as they deemed proper. Counsel for appellee hereby state to this Court that it is their positive recollection that there were considerable discussions, oral understandings and agreements made during the course of the trial and considered by the trial court which are not contained in the record for the reason that they were, in our opinion, unnecessary to rebut the points relied upon by appellant as above stated. In other words, we believe that while the reporter wrote up all of the actual questions and answers asked of the witnesses, he did not take down all the discussions and stipulations of counsel. The effect of these discussions and stipulations was that it was agreed there was no consideration for the declaration of trust other than a pre-existing subscription agreement which appel-

lant undertook to prove and which it failed to prove, and the result of which was that the trial court properly considered that the declaration of trust was squarely presented as an issue and which amply supported the finding of the trial court that there was no consideration for the declaration of trust. Had the appellant in its statement of points to be relied upon raised the proposition that it was a holder of a valid encumbrance against this property and the trial court had no right to find this encumbrance to be void or invalid, we should have, as counsel for appellee, had an opportunity to insert such matter in the record as we thought bore upon that issue. We believe this Court has gone on the assumption that everything that happened before the trial court is contained in the record and we assert that this Court can only conclude that such matters are in the record as bear on the points raised by appellant on the appeal. We specifically call the attention of this Court to rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth District. Subdivision 6 states that the appellant shall file with the clerk a statement of the points on which he intends to rely on the appeal and that the adverse party shall, within ten days thereafter, designate in writing, additional parts to the record which he thinks material. The rule then continues with these words: "If the appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the Court shall think proper." We believe that this rule prohibited us from causing anything to be put in the record which did not bear directly on the points raised by appellant and that this Court has been unfair to the appellee in inserting into this proceeding a matter not raised by the appellant.

II.

On the Record As It Now Stands That Portion of the Opinion Complained of Is Erroneous.

We submit that the record now before the Court discloses that the declaration of trust was sufficiently presented to the trial court so that it had a right to pass upon it. The declaration of trust was set up in the answer and the entire case was tried on the theory that it was an integral part of the transfer under attack and furnished the consideration claimed by appellant for the deed. The answer states that "James Marwick, prior to the 28th day of November, 1927, made and entered into a certain subscription agreement by the terms of which he agreed to pay to the said answering defendant the sum of $25,000.00 for the reconstruction of the house of worship." The answer then continues "that thereafter * * * the said James Marwick, to secure the payment of said promise by him made, to pay said sum of $25,000.00 to said defendant, did make, execute and deliver to said defendant a certain deed of trust." It should be observed that the appellant's theory is not that the deed of trust supplies its own consideration but that it was given in consideration of a pre-existing debt, to-wit, a subscription agreement. In support of this allegation and without opposition by counsel for appellee, testimony was offered by appellant in an attempt to prove the existence of this pre-existing promise. This is the only consideration for the deed of trust claimed by the appellant and on this evidence the trial court found that the alleged consideration did not exist. As suggested by one of the judges of this

Court at the time of oral argument, a written agreement purports consideration, but it must also be borne in mind that when the consideration, if any, is carefully inquired into and found to be non-existent, a Court then can properly find that there was no consideration and the trial court did so find. Attention is called to the prayer of the answer. It asks that if the Court finds the deed to be void, the Court then give appellant a lien for taxes. This is exactly what the Court did and we fail to see how the trial court can be held to be in error for arriving at the exact results asked by the appellant in its answer upon finding that the deed was void, which finding has been upheld by this Court.

Furthermore, appellant concedes by its brief on file before this Court, that "if, as the Court decided, the terms of the pledge or subscription are to be determined from the recitations contained in the declaration of trust alone, the subscription was conditional and not enforceable." (App. Br. p. 9.) We respectfully ask the Court how, if the subscription were not enforceable, it could hold that there was any consideration for the declaration of trust? We showed in our brief that a mortgage is unenforceable and of no effect unless based on a consideration and that a mortgage can have no existence independent of the note or obligation which it is given to secure. (Appellee's Br. pp. 10 and 11.) We therefore urge that this Court cannot hold this declaration of trust to be a valid mortgage unless it holds that there was a valid and subsisting debt or obligation which the mortgage was given to secure and this debt or obligation is entirely lacking from this case.

III.

In Any Event This Court Should Not Have Interpreted the Declaration of Trust As It Did.

The opinion states: "The judgment avoided not only the deed, but also the declaration of trust. This was error. Avoidance of the declaration was not sought in this action. The declaration was not mentioned in the complaint. It was pleaded in the answer and put in evidence by appellant. Its validity was not challenged by pleading or by proof. There was, therefore, no basis for holding it void." This Court having held as above that the declaration of trust was not in issue, it then proceeds in the opinion to pass upon the legal effect of the declaration of trust, thereby doing exactly what it holds the lower court should not have done. If the declaration of trust were not in issue, this Court then had no right to decide that the declaration of trust "was, in effect, a mortgage." Further, this Court had no right to decide that "appellant's rights under the declaration were and are those of a mortgagee holding a valid subsisting mortgage," etc. From the foregoing we believe it follows that if this Court is correct in its statement that the declaration of trust was not in issue, it should modify the judgment of the lower court only to the extent of adjudging that the rights of the parties under the declaration of trust are not hereby decided, and these should be relegated to an appropriate action for that purpose.

Counsel for appellee believe that appellee has a good defense to any action which might be commenced by appellant to foreclose the declaration of trust as a mortgage. No such foreclosure was sought in the instant case and this Court has held that the declaration of trust was

not in issue. It is manifestly unjust, therefore, for this Court to now prevent appellee from urging, at an appropriate time in the future, that the declaration of trust was of no effect.

Let it be assumed that the declaration of trust had never been presented to the trial court and that the trial court had declared the deed to be void. This Court in its opinion holds the trial court could and should have done just that. The position of the parties would then be as follows: Appellee would be the owner of the property and appellant would be in possession of the declaration of trust and have the right to enforce whatever rights it had under it. The only way it could enforce any such right would be to commence an action to foreclose the document as a mortgage. In order to do this it would have to allege and prove that there was a consideration for the mortgage. While it is true that under certain circumstances a written document purports a consideration, we do not believe this Court would hold that a plaintiff in an action to foreclose a mortgage could prevail in his action by merely introducing the mortgage into evidence and not proving the note or other obligation which it was given to secure. Yet, that is the effect of the present decision.

Consideration should be given to the theory upon which the case was tried. The appellant set up the declaration of trust in its answer but it did not claim or allege that the declaration of trust gave rise to any rights in favor of appellant other than as owner of the property. Appellant's position in this connection is supported in the opinion of the trial court and particularly in the two paragraphs appearing on page 23 of the clerk's transcript.

Authorities.

In support of the foregoing arguments we respectfully submit as authority for our position the following three cases, two of which were decided by this Court and one by the Eighth United States Circuit Court:

Ashton v. Glaze, 95 Fed. (2d) 427; 36 A. B. R. (N. S.) 356. Ninth Circuit Court, March 14, 1938:

"Appellant argues that the liquidator did not plead an estoppel, and that the pleadings in this respect do not support the decree. However, the case was apparently tried without objection on the theory estoppel was involved; and the pleadings may be deemed to be amended in conformity with the proof.

"On the appeal, for the first time, appellant attacks the decree on the asserted ground that Glaze note of ten thousand dollars had become barred by the statute of limitations. * * * However, the statute of limitations was not pleaded, nor was the question otherwise raised below. The only issue presented to the trial court was that concerning the right of the liquidator on the basis of the facts related earlier in this opinion to retain the securities. * * * There is no indication in the assignment of error or elsewhere of the intention of the appellant to claim the benefit of the statute. It is elementary that the defense of laches, or of the statute of limitations will not be considered when raised for the first time in an Appellate Court."

International Harvest Company v. Schmidt, et al., 72 Fed. (2d) 300; 26 A. B. R. (N. S.) 68. Eighth Circuit Court, July 10, 1934:

"A second question has been raised on this appeal. It is set out in one of the assignments of error as follows: * * * We decline to consider this assignment of error for the reason that it appears from the transcript of record that no such question as that presented by the assignment ever was submitted either to the Referee in Bankruptcy, or to the District Court. The only question passed on by the Referee and the District Court, and the only question submitted to them was whether the conditional sales contract involved in the case was lawfully acknowledged."

Clark Brothers v. Portex Oil Co., 115 Fed. (2d) 45; 43 A. B. R. (N. S.) 508. Circuit Court of Appeals, Ninth Circuit, June 28, 1940 (opinion written by Justice Mathews):

"Appellant contends that the proceedings should have been dismissed on the ground that the petition was not filed in good faith. That was not a ground of appellant's motion. Not having been raised below, the question of good faith, here, attempted to be raised, will not be considered."

Conclusion.

We conclude by urging upon the Court that it should not have modified the judgment of the trial court in any manner and that if it still feels that such modification is proper, it should not now determine the rights of the parties under the declaration of trust. Further, we submit that under rule 27 of this Court, appellee is entitled to costs herein. This is mentioned because the clerk has construed this opinion as allowing costs to appellant.

Respectfully submitted,

MAURICE BLUMENTHAL,
EDWARD GALLAUDET,
SAMPSON MILLER,
Attorneys for Appellee.

Certificate of Counsel.

I, Edward Gallaudet hereby state that in my judgment this petition for rehearing is well founded and I state that it is not interposed for delay.

EDWARD GALLAUDET.